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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

NO. 4

NATIONAL LABOR RELATIONS BOARD ..... *Petitioner*

v.

LION OIL COMPANY AND MONSANTO CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

STATUTE INVOLVED

The Labor Management Relations Act of 1947 (61 Stat. 136, U. S. C. A., Title 29, Sect. 151, et seq.) Section 7 (Appendix 37), Section 8 (d) (Appendix 38), and Section 10 (c) (Appendix 40).

QUESTION PRESENTED

Do employees who go out on economic strike, when a collective bargaining contract between their employer and their union governing their working conditions is in full force and effect, in violation of that contract, engage in activity which is unprotected by the Labor Management Relations Act of 1947?

STATEMENT OF THE CASE

The Facts

Lion Oil Company and Oil Workers International Union, CIO, the certified bargaining agent of employees of the company working in the operating and labor departments of its chemical plant at El Dorado, Arkansas, entered into a collective bargaining contract providing in detail the wages, hours and conditions under which those employees should work for the company during the term of the agreement. Article I of the agreement (R. 28, 206) is as follows:

"ARTICLE I

Term of Agreement

This agreement shall remain in full force and effect for the period beginning October 23, 1950, and ending October 23, 1951, and thereafter until canceled in the manner hereinafter in this Article provided.

This agreement may be canceled and terminated by the Company or the Union as of a date subsequent to October 23, 1951, by compliance with the following procedure:

(a) If either party to this agreement desires to amend the terms of this agreement, it shall notify the other party in writing of its desire to that effect, by registered mail. No such notice shall be given prior to August 24, 1951. Within the period of 60 days, immediately following the date of the receipt of said notice by the party to which notice is so delivered, the Company and the Union shall attempt to agree as to the desired amendments to this agreement.

(b) If an agreement with respect to amendment of this agreement has not been reached within the 60-day period mentioned in the sub-section immediately pre-

ceding, either party may terminate this agreement thereafter upon not less than sixty days' written notice to the other. Any such notice of termination shall state the date upon which the termination of this agreement shall be effective."

On August 24, 1951, the union transmitted to the company, Federal Mediation and Conciliation Service and the Labor Commissioner of Arkansas, by mail, the following letter (R. 81):

"OIL WORKERS INTERNATIONAL UNION,
C. I. O.
EL DORADO LOCAL NO. 434
EL DORADO, ARKANSAS

AUGUST 24, 1951
REGISTERED MAIL
RETURN RECEIPT REQUESTED
SPECIAL DELIVERY

Lion Oil Company
Lion Oil Building
El Dorado, Arkansas

Attention: Mr. T. M. Martin, President
Federal Mediation and Conciliation Service
14th and Constitution Avenue, N. W.
Washington 25, D. C.

Gentlemen:

Pursuant to the provisions of the Labor-Management Relations Act of 1947, you are hereby notified that we desire to modify the collective bargaining contract now in effect between your company and this Union, in accordance with the provisions of the agreement.

We are attaching hereto some of the proposed changes which we desire to include in a new contract or as modifications to the present agreement. We shall be glad to and now offer to meet and confer with you for the purpose of negotiating a new contract or modifications to the present agreement.

Copies of this notice are being served upon the Federal Mediation and Conciliation Service, and the appropriate State Agency for the purpose of advising them of this dispute solely because of the alleged requirements of Section 8 (d) (3) of the Labor-Management Relations Act of 1947, and subject to the validity of all provisions of such Act.

Sincerely yours,

OIL WORKERS INTERNATIONAL UNION, C. I. O.
By (s) E. P. Shelton, Chairman
Workmen's Committee
Lion Oil Group Local 434-OWIU-CIO

Att."

Attached to the letter were proposals for 43 amendments to the then existing contract (R. 82-94).

Representatives of the company and the union first met on August 29, 1951, to discuss the proposed amendments. Between that date and April 30, 1952, 37 such meetings were held for that purpose. No agreement for amendment of the existing contract was reached.

On April 30, 1952, the union, and other unions, called a nationwide strike in the oil industry to force an increase of 22c in the hourly wage rate of each employee involved, an increase in shift differentials to 6c an hour for work on the evening shift and to 12c an hour on the graveyard shift, and an additional holiday with pay. On that call, the strike here involved began on that date (R. 117).

Neither the company nor the union gave to the other notice of termination of the contract (R. 150).

While the strike was in progress the company continued the operation of portions of the plant by supervisors, clerks and technicians (R. 151, 139-140). On June 21, 1952, after the employees here involved had been continuously on strike since April 30, 1952, the union offered to return all strikers to work unconditionally (R. 153). That offer was refused by the company. Two days later the company sent to each striking employee a copy of a letter which it had sent to the union, in which letter the company stated that the dispute could not be settled until the employees were willing to agree to go to work and continue to work for a period of at least one year with no strike or other work stoppage during that period (R. 95, 100).

On or shortly after June 21, 1952, striking employees, in groups and individually, requested permission from the plant manager to return to work. He refused the request of some because they would not agree to continue to come to work if it were necessary to cross a picket line. Some were refused permission by him since he then had no work for them to do. A few, each of whom agreed to continue to work even though it was necessary to cross a picket line, were permitted by him to return to work (R. 156, 120-121).

Negotiations for a settlement continued after June 21, 1952, and on August 3, 1952, a new contract was entered into between the company and the union and all strikers returned to work immediately thereafter (R. 115-116, 206).

Proceedings Before the Board

After June 21, 1952, and prior to the settlement of the dispute, the union filed with National Labor Relations Board a charge that the company was guilty of unfair labor practices in its dealing with the union, after the union

had, on June 21, 1952, offered to return the strikers to work and prior to the settlement of the dispute.

On the basis of that charge the Board issued a complaint against the company, charging it with violation of Sections 8 (a) (1), 8 (a) (3) and 8 (a) (5) of the Labor Management Relations Act, in its relations with the union during the period mentioned in the charge (R. 1).

The company filed an answer to the complaint in which it denied the allegations of unfair labor practices and, further, set up as a separate defense the claim that the strike was called by the union at the time when there was in effect between the union and the company a collective bargaining contract; that the strike was in violation of that agreement, was an unfair labor practice under the provisions of the Act, and that the employees participating therein were not entitled to any relief under the Act (R. 23).

In its Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order, the Board concluded that the union had complied with Section 8 (d) of the Act when the strike here involved began (R. 162), to which the company filed exception (R. 195, Exception 15); concluded that the company was not justified in refusing to reinstate the strikers until a new contract was signed (R. 163), to which the company filed exception (R. 196, Exception 16); and concluded that there was no misconduct of the union or delinquency by the employees in their obligation to the company (R. 164), to which the company excepted (R. 196, Exception 18).

The majority of the Board held that the company was guilty of unfair labor practices within the meaning of Sections 8 (a) (1), 8 (a) (3) and 8 (a) (5) of the Labor Management Relations Act and, among other orders, ordered the company to make whole each of the 546 (R. 6) employees with respect to loss of earnings suffered between June 21, 1952, and August 3, 1952 (R. 217, 133).

Proceedings in Court of Appeals

On petition of the company for an order setting aside the order of the Board, and the cross-petition of the Board for enforcement of the order, the United States Court of Appeals for the Eighth Circuit set aside the order of the Board on the ground that the strike here involved was in violation of contract between the company and the union, was therefore a violation of Section 8 (d) of the Act, that the strikers lost their status as employees and were not entitled to relief provided in the Board's order (R. 255).

While Petition for Writ of Certiorari was pending herein, Lion Oil Company was merged into Monsanto Chemical Company and an order was entered making the company last named a Respondent.

To review the decision of the Court of Appeals, certiorari was granted (R. 256).

Summary of Argument

As stated in *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270: "The answer turns upon the proper interpretation of the particular contract before us. Like other contracts it must be read as a whole and in the light of the law relating to it when made."

When we view in that light the decision of the Court of Appeals which is under review, the conclusion reached by that Court is found to be sound and should be affirmed. Although that Court mentioned only Section 8(d) of the Act as a basis for its conclusion and order, its findings that the strike was in violation of contract, that the strikers lost their status as employees of the company and were not entitled to the relief that the order of the Board afforded, equally sustained that conclusion and order on the principle that the activities of the union and of the employees in the

strike here involved were not protected activities within Section 7 of the Act.

We shall discuss the principle last mentioned before proceeding to the question of applicability of Section 8 (d) to the facts in this case.

The strike here involved was in violation of the contract in effect between the union and the company at the time the strike began. Each member of the Board in his opinion in this case recognized that the contract here involved was in effect when the strike began. Distinguished counsel for the petitioner admit that fact in their brief at page 17. The Court of Appeals so found (R. 255). The Supreme Court of Arkansas so decided in a case involving this same strike and this same contract. *Lion Oil Company* v. *Marsh*, 220 Ark. 678, 249 S. W. 2d 569, 571. The strike was a breach of, and a repudiation of, that contract.

The contract fixed a specific hourly rate at which each employee doing work in one of the jobs listed was to be paid for that work while the contract was in effect (R. 67), provided for the payment of a shift differential of 4c an hour for work done on the evening shift and 6c an hour for work done on the graveyard shift (R. 68), and provided for six holidays with pay each year (R. 36). Thereby the union agreed that each employee would work under the contract, including those provisions for compensation, so long as he continued to be an employee of the company and the contract continued to be in effect. Likewise, each of the men represented by the union in making that contract was bound by that agreement made by his bargaining agent. *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71.

When the union, on April 30, 1952, called these employees out on strike, as a part of a nationwide strike in the oil industry, for the purpose of forcing the company to

increase the basic hourly wage rate of each employee by 22c an hour, to increase the shift differentials to 6c an hour for evening shift work and to 12c an hour for graveyard shift work, and to allow an additional holiday with pay, (R. 117) it breached and repudiated that contract.

In *NLRB* v. *Sands Manufacturing Co.*, 306 U. S. 332 (1939), this Court held that employees who went on strike to force the company to abandon the application of the provisions of the contract between their union and the company providing for sectional seniority and establish in lieu thereof plant seniority, breached and repudiated the contract; that the company was at liberty to treat them as having severed their relations with the company because of their breach and to consummate their separation from the company's employ and hire others to take their places, and that the Board had no right or authority, under the National Labor Relations Act, to order their reinstatement.

When the Congress had before it for consideration the Taft-Hartley amendment to the National Labor Relations Act, the principle established by that decision was recognized by both the proponents and the opponents of the amendment.

Sect. 7 (a) H. R. 3020 (H. Rep. 245, 80 Cong., 1st Sess. p. 19), as reported by the Committee on Education and Labor (Appendix 42), provided that employees should have the right to participate in concerted activities but expressly proscribed such activities which constituted "violations of collective-bargaining agreements."

In the report of the Committee on Labor and Public Welfare submitting S. 1126 (S. Rep. No. 105, 80th Cong., 1st Sess., p. 15), the majority of the committee stated: "The committee bill makes collective bargaining contracts equally binding and enforceable on both parties." and later it was stated: "If unions can break agreements with relative

impunity, then such agreements do not tend to stabilize industrial relations." (Appendix 43, 44).

Again, in that report, in reference to Section 13 of the Act (p. 28), attention was called to the fact that this Court had interpreted the National Labor Relations Act as not conferring protection upon employees who strike in breach of contract, or in breach of some Federal law, or who engage in illegal acts while on strike, and it was stated: "This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions" (Appendix 45).

In the minority report on S. 1126 (S. Min. Rep. 105, 80th Cong., 1st Sess., p. 12) under the heading "Violations of Collective-Bargaining Agreements," the minority stated: "There can be no question that collective-bargaining agreements, like other contracts, should be faithfully performed by the parties."

In the House conference report on H. R. 3020 (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 38) under the title "Rights of Employees," the committee urged the House to recede from its insistence upon including an expressed provision in Section 7 of the Act excluding concerted activities of employees in violating a collective bargaining agreement from concerted activities protected by the Act since it was established that violation of a collective bargaining agreement was concerted activity not protected by the Act, and, consequently, the inclusion of that specific provision was unnecessary (Appendix 46).

Senator Taft, in explaining the conference bill in the Senate and advocating its adoption, incorporated as a part of his remarks a summary of the principal differences between the conference bill and the bill which the Senate had passed (Cong. Rec. June 5, 1947, p. 6598, 6600), which

statement in reference to Section 7 of the conference bill is to the same effect (Appendix 48).

When the employees here involved went on strike on April 30, 1952, each of them lost his status as an employee of the company. The company was, as held in *Sands*, no longer obligated to negotiate with the union as their representative, and could have discharged each of them had it seen fit to do so.

When on June 21, 1952, the union offered to cause the employees to return to work, the company refused to permit them to return until such time as the union had entered into a contract with it to extend for a period of one year, with the agreement that there should be no strike or other concerted work stoppage during that period. That action by the company was suspension from employment of each of those employees.

Learned counsel for the petitioner argue that, if the strike was in breach of contract, the only right which the company had was to discharge each of the employees if it be held that their participating in the strike was an unprotected activity. To adopt that attitude would remove human relations from labor management relations; would convert many disputes resulting from employees striking in violation of contract into bitter conflicts, disrupting industrial peace. To avoid the drastic course of discharging each of this great number of men, the company elected to suspend each of them from employment until its demands on the points mentioned were met. Each of the employees was suspended because of his violation of the terms of the contract between the company and his union in effect at the time the strike here involved began. That suspension was a suspension of his employment for cause. The Board, therefore, had no authority to enter an order requiring the company to make each employee whole for the loss of earnings which he may have suffered between June 21,

1952, and the date upon which he returned to work under the new contract. Section 10 (c) of the Act (Appendix 40) contains the provision: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

For these reasons the order of the Court of Appeals in this case setting aside the order of the Board was proper and should be affirmed regardless of whether the order may be sustained by the application of Section 8 (d) of the Act to the facts in this case. "In the review of judicial proceedings, the rule is settled that, if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason." *Brown* v. *Allen*, 344 U. S. 443, 459, *Helvering* v. *Gowran*, 302 U. S. 238, 245.

The Court of Appeals was correct in holding that the strike here involved was in violation of Section 8 (d) of the Act and in setting aside the order of the Board on that ground. Section 8 (d) provides specific requirements which must be met by a party to a collective bargaining agreement who, by unilateral action, terminates that agreement. A party to such an agreement who terminates it by unilateral action without complying with all of those conditions is, by the provisions of that Section, made guilty of the commission of an unfair labor practice. At the time this strike began, the contract between the union and Lion Oil Company, in accordance with the provisions of sub-paragraph (b) of Article I (R. 28) of the contract, could have been terminated by either party on sixty day notice given to the other. The union, however, did not elect to terminate the agreement, as, under the contract, it had a right to do, by notice to the company, but took the bit in its teeth and called the employees here involved out on strike, thereby

strike on that day, for the purpose of forcing Lion Oil Company to put into effect immediately the increase in pay for each employee which the union demanded (R. 117).

The act of the union in calling the strike, and the act of each employee who participated in the strike, was a breach and repudiation of that contract. In *NLRB* v. *Sands Manufacturing Co.*, 306 U. S. 332 (1939), this Court held that employees, who went out on strike to force their employer to abandon the application of the provisions of the contract between their union and the company providing for sectional seniority and establish in lieu thereof plant seniority, breached and repudiated the existing contract.

On the authority of that decision, the calling of the strike in this case by the union and the participation in it by the employees involved was a breach and repudiation of the contract between the union and Lion Oil Company.

When the Taft-Hartley amendment to the National Labor Relations Act was under consideration by the Congress, the decision of this Court in the *Sands Manufacturing Company* case had a most decisive effect upon the deliberations in Congress and the form in which the amendment was adopted.

Sect. 7 (a) H. R. 3020 (H. Rep. 245, 80 Cong., 1st Sess., p. 19), as reported by the Committee on Education and Labor (Appendix 42), provided that employees should have the right to participate in concerted activities but expressly proscribed such activities which constituted "violations of collective-bargaining agreements."

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ments with relative impunity, then such agreements do not tend to stabilize industrial relations" (Appendix 43, 44).

Again, in that report, in reference to Section 13 of the Act (p. 28), attention was called to the fact that this Court had, in the *Sands Manufacturing Co.* case, interpreted the National Labor Relations Act as not conferring protection upon employees who strike in breach of contract or in breach of some Federal law or who engage in illegal acts while on strike. The statement with reference thereto concluded with the paragraph: "This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions" (Appendix 45).

In the minority report on S. 1126 (S. Min. Rep. 105, 80th Cong., 1st Sess., p. 12) under the heading "Violations of Collective-Bargaining Agreements," the minority stated: "There can be no question that collective-bargaining agreements, like other contracts, should be faithfully performed by the parties."

In the House conference report on H. R. 3020 (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 38) under the title "Rights of Employees," the committee urged the House to recede from its insistence upon including an expressed provision in Section 7 of the Act excluding concerted activities of employees in violation of collective bargaining agreements from concerted activities protected by the Act, it being established that that provision was unnecessary (Appendix 46).

Senator Taft, in explaining the conference bill in the Senate, incorporated as a part of his remarks a summary of the principal differences between the conference bill and the bill which the Senate had passed (Cong. Rec., June 5, 1947, p. 6598, 6600), which statement in reference to Section 7 of the conference bill is to the same effect as the

statement in the House conference report to which we have just referred (Appendix 48).

This Court, in *International Union* v. *W. E. R. B.*, 336 U. S. 245, 259, in holding that Section 7 of the Act does not protect intermittent and unannounced work stoppages by employees, pointed to that portion of the House conference report last mentioned as persuasive in causing this Court to reach that conclusion. The statement of the majority of the Court in that opinion on that point, which to us is most significant, is as follows:

> "As to the right to strike, however, this Court, quoting the language of § 13, has said, 306 U. S. 240, 256, 'But this recognition of the "right to strike" plainly contemplates a lawful strike — the exercise of the unquestioned right to quit work,' and it did not operate to legalize the sit-down strike, which state law made illegal and state authorities punished: *National Labor Relations Board* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240. Nor, for example, did it make legal a strike that ran afoul of federal law, *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31; nor one in violation of a contract made pursuant thereto, *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332; nor one creating a national emergency, *United States* v. *United Mine Workers*, 330 U. S. 258.
>
> That Congress has concurred in the view that neither § 7 nor § 13 confers absolute right to engage in every kind of strike or other concerted activity does not rest upon mere inference; indeed the record indicates that, had the Courts not made these interpretations, the Congress would have gone as far or farther in the direction of limiting the right to engage in concerted activities including the right to strike. The House Committee of Conference handling the bill

which became the Labor Management Relations Act, on June 3, 1947, advised the House to recede from its disagreement with the Senate and to accept the present text upon grounds there stated under the rubric 'Rights of Employes.' H. R. Rep. No. 510, 80th Cong., 1st Sess., p. 38. The Committee pointed out that 'the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. * * *' And 'it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act.' "

The legislative history which we have cited establishes conclusively that the union in calling the strike in this case and the employees involved in participating in that strike engaged in concerted activities unprotected by Section 7 of the Act.

Counsel for petitioner contend that the decision in the *Sands Manufacturing Co. case* " * * * does not support the Company's thesis that a strike for contract modifications is forbidden at a time when the parties, as in this case, have agreed that their contract should be open for the purpose of negotiating modifications" (48).

That statement, in our judgment, is unsound since it is predicated upon the unsupported assumption that the parties to the contract in this case had agreed that their

breaching, repudiating and terminating that contract with utter disregard of all of the requirements of Section 8 (d) of the Act.

The majority of the Board held that the union complied with Section 8 (d) of the Act by giving the company notice of its desire to amend the contract, informing Federal Mediation and Conciliation Service and the Commissioner of Labor of Arkansas of that fact, and waiting sixty days after that notice was given before it called the strike, though the contract remained in full force and effect at the time the strike was called. The gravamen of the reasoning of the majority of the Board in reaching that conclusion is the following statement (R. 213): "It suffices for our decision here that the contract specifically provided for modification and that the earliest date on which modification could be made effective was October 23, 1951."

If, by that statement, it was meant that October 23, 1951, was the first date upon which the contract could have been modified by mutual agreement, it is false. It is a most rudimentary principle of the law of contracts that a bilateral contract may be modified at any time by mutual consent of the parties. If, by that statement, the majority of the Board meant that October 23, 1951, was the earliest date on which modification of the contract, by unilateral action of one of the parties could be made, the statement is equally false. The contract here involved did not give either party the right to modify the contract by its unilateral act.

The language of Article I of the contract cannot be interpreted as giving to either party to the contract unilateral right to modify it, nor did it contain a re-opener clause, whatever that may mean. Article I of the contract provided only the procedure by which either party might have *canceled and terminated* the contract on the happening, in the order stated, of each of four conditions prece-

dent: (1) written notice after August 23, 1951, by either party to the other of its desire to amend the agreement, (2) negotiations between the company and the union during the period of sixty days immediately following the receipt of such notice in an attempt to agree on the amendment proposed, (3) absence of agreement as to the proposed amendment during the period stated, and (4) a sixty day written notice of termination of the agreement.

That provision was hand tailored to fit the requirement of Section 8 (d) of the Act with respect to the notice required to terminate a contract permitting unilateral termination by notice. It has nothing to do with modification of the contract by one of the parties to it.

The notice given by the union of its desire to modify the contract did not modify the contract. It was not so intended for the union had no right under the contract to modify it. The notice was given "in accordance with the provisions of the agreement" (R. 81) as the first step toward a possible termination of the agreement in the manner provided in Article I thereof. The requirements of subsections (1), (2), (3) and (4) of the proviso of Section 8 (d), do not come into play with respect to modification of a contract in the absence of an act by one party to the agreement, who has a right under the contract to do so, to effect modification of it. The introductory clauses of the proviso so provide. Therefore Section 8 (d) requirements, relative to modification of a contract, have no bearing in this case, neither party having the right under the contract here involved to modify the contract. Learned counsel for the petitioner ignore the clear words of the introductory clauses of the proviso of that Section.

In fact, this strike was not related to the notice given by the union to Lion Oil Company on August 24, 1951. That notice stated a desire to amend the existing contract in 43 particulars (R. 82-94). This strike was called by the un-

ion eight months later as a part of a nationwide strike in the oil industry called by the union, and other unions collaborating with it (R. 117), to support their nationwide demand for specified increases in pay.

We submit that the legislative history, with respect to the various provisions of the Act, to which we have referred, demonstrates that, when a union causes employees whom it represents to refuse to work in accordance with the terms of an existing contract between the union and their employer, thereby breaching and repudiating that contract, the union has terminated the contract by unilateral action within the meaning of the word "terminate" as used in the introductory clauses of the proviso of Section 8 (d) and, by so doing, commits an unfair labor practice.

If the union had, after October 23, 1951, adopted the course of terminating the contract as provided in the contract before calling a strike, it could have done so by giving a sixty day written notice of its election to do so, which would have, in accordance with the provisions of the contract, ended the contract at the expiration of the sixty days. That notice also would have complied with the mandate of Section 8 (d) of the Act with respect to notice of termination. If such notice had been given and the union had thereafter called this strike prior to the expiration of the sixty days, it clearly would have committed an unfair labor practice under the provisions of Section 8 (d) and the striking employees which it represented would have lost their status as employees under the loss of status provision of that Section.

The union and the employees participating in this strike should not be placed in a more favorable position merely because of the fact that the union disregarded totally the requirements of Section 8 (d) and, by its unilateral act, brought to an end the life of the contract by total breach and repudiation of it. That anomalous result

is avoided by construing the word "terminate" in the introductory clauses of the proviso to denote the bringing of a bilateral collective bargaining agreement to an end through a total breach and repudiation of it by one party to it.

Unless the strike here involved was a termination of the contract by unilateral action of the union, the proscription of the proviso of Section 8 (d) with respect to termination has no application in this case.

We believe, however, that application of Section 8 (d) to the facts of this case by the Court of Appeals in its opinion in this case is sound and its order setting aside the order of the Board should be affirmed on that ground. If not, the order of the Court below should nevertheless be affirmed on the ground that this strike in violation of contract was unprotected activity.

ARGUMENT

Point I

THE CALLING BY THE UNION OF THE STRIKE HERE INVOLVED AND THE PARTICIPATION IN THAT STRIKE BY THE EMPLOYEES HERE INVOLVED WAS ACTIVITY UNPROTECTED BY SECTION 7 OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947; CONSEQUENTLY, THE BOARD HAD NO RIGHT TO ENTER THE ORDER WHICH IT ENTERED IN THIS CAUSE.

In considering this point, we must determine the proper interpretation of the particular contract here involved. Like other contracts it must be read as a whole in the light of the law relating to it when made. So the majority of this Court stated in the recent opinion in the case of *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270.

The fact that the contract between Lion Oil Company and the union was in full force and effect at the time the union called, and the employees represented by it began, the strike here involved is not in dispute. Each member of the Board in his opinion in this case recognized that fact. Distinguished counsel for the petitioner admit that fact in their brief at page 17. The Court of Appeals so found (R. 255). The Supreme Court of Arkansas so decided in a case involving this same strike and this same contract. *Lion Oil Company* v. *Marsh*, 220 Ark. 678, 249 S. W. 2d 569, 571.

Although the point is disputed by counsel for petitioner, it is, we submit, equally clear that the strike here involved was in violation of the contract in effect between the union and Lion Oil Company at the time the strike began.

The contract fixed a specific hourly wage rate for work done on each job to be performed, which the company was obligated to pay the employee and which the employee was obligated to accept for that work (R. 67). It provided that each employee working on the evening shift should be paid 4c an hour in addition to the basic hourly rate for each hour worked on that shift and that each employee working on the graveyard shift should be paid 6c an hour in addition to the basic hourly rate for each hour worked on that shift (R. 68). The contract provided for six holidays with pay during each year and for the payment of double the hourly wage rate for work done on one of those holidays (R. 36). Thereby the union agreed that each of the employees whom it represented in making the contract should, so long as he continued to be an employee of the company and the contract continued to be in effect, work for that compensation together with the additional allowances provided in the agreement. Furthermore, each of the men represented by the union in making that contract was obligated to work for the company for the compensation provided by the contract for work on the job in which he was employed. *NLRB* v. *Rockaway News Supply Co.*, 345 U. S. 71.

On April 30, 1952, while the contract, containing those provisions with respect to compensation and provisions as to many other conditions under which employees should work, was in full force and effect, the union, together with other unions, called a nationwide strike in the oil industry for the purpose of forcing each employer against which strike action was taken, including Lion Oil Company, to increase the basic hourly wage rate of each employee, employed by it and represented by the union, by 22c an hour, to increase his shift differentials to 6c an hour for evening shift work and to 12c an hour for graveyard shift work and to allow an additional holiday with pay. The employees here involved, in response to that call, began this

contract should be open for the purpose of negotiating modifications.

The provisions of Article I of the contract (R. 28) are not susceptible of such interpretation. The Article did not contain any provision that properly can be said to be a re-opening provision or a provision which opened the contract for the purpose of negotiating modifications. The brief of distinguished counsel for petitioner is replete with such unsupported statements. At page 17 is the statement that the contract provided for "* * * re-opening during its term for the purpose of modifying its provisions * * * ". At page 20, October 23, 1951, is referred to as the date "* * * provided by the contract for modifications to become effective * * * " On the same page it is stated that the contract provided " * * * for re-opening and amendment during its term."

In the statement of the question presented (page 2), counsel refer to the contract here involved as being a contract which "* * * provides for negotiation and the adoption of modifications * * * ".

The provisions of Article I of the contract did not provide for negotiation and adoption of modifications. It is true that it provided that, as the first step toward terminating the agreement, either party to the contract could submit to the other a proposed amendment to the contract. That, however, is far short of providing for negotiation and adoption of modifications. There is nothing in that provision which would imply that the party to whom such an amendment was submitted was obligated to agree to it in the form in which it was submitted or in altered form.

This contract did not contain a re-opening clause. It provided for no date on which modifications should be effected. Article I of the contract provided only the procedure by which either party might have *canceled and termi-*

nated the contract on the happening, in the order stated, of each of four conditions precedent: (1) written notice after August 23, 1951, by either party to the other of its desire to amend the agreement, (2) negotiations between the company and the union during the period of sixty days immediately following the receipt of such notice in an attempt to agree on the amendment proposed, (3) absence of agreement as to the proposed amendment during the period stated, and (4) a sixty day written notice of termination of the agreement.

Counsel for the petitioner, at page 48 of their brief, refer in passing to the fact that the contract here involved did not contain a no strike clause. On the authority of *Sands*, we assert with confidence that that fact is of no consequence here since in *Sands* the contract involved did not contain a no strike clause.

Counsel for petitioner further contend (50) that under the principle established by this Court in the *Sands Manufacturing Co.* case, Lion Oil Company had no right to suspend the employment of the employees involved as a penalty for their having participated in the strike in violation of contract, but was permitted only to discharge them as a penalty for their unprotected activity.

If that conclusion were sustained, it would be most disruptive of peaceful industrial relations. It is well known that when an employer discharges striking employees the bitterness between the contestants is prolonged by such action. Only a long continued dispute, most disruptive of peaceful industrial relations, can be expected as a result of such action.

When the employees here involved struck in violation of contract, Lion Oil Company did not elect to adopt the harsh action of discharging the 546 striking employees. To the contrary, between the date upon which the strike

began and June 21, 1952, on which date the union offered to return the men to work, the company attended bargaining sessions with representatives of the union in an effort to settle the strike.

On June 21 the union and the men were continuing the strike begun in violation of contract. Their concerted activities, therefore, continued to be unprotected by the Act. Under those circumstances, when the union offered to return the men to work on June 21, the course was still open to the company, as it should have been, to suspend each of the striking employees from employment rather than to discharge him.

Consequently, two days later, the company sent to each striking employee a copy of a letter which it had transmitted to the union, stating that the dispute between the company, the union and the employees involved could not be resolved until the strikers were "willing to agree to go to work and continue to work for a period of at least one year with no strike or other work stoppage during that period" (R. 100). That statement, we submit, was a suspension of each striker for cause.

The right of an employer to suspend an employee for cause is recognized by the Act. Section 10 (c) of the Act contains the following provision: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." By that provision, the Board in this case was deprived of authority to enter that portion of its order which required Lion Oil Company to make whole each of the employees on strike with respect to loss of earnings during the period beginning June 21, 1952, and ending on August 3, 1952, the date upon which the dispute was settled.

It appears unnecessary for us to argue to sustain the merit of requiring a union and the men represented by it to perform faithfully the obligations which the union has assumed under a collective bargaining contract executed by it as representative of the employees so long as the employer, as in this case, complies with the agreement and does not commit an unfair labor practice. We would not presume to improve upon the statements made with respect thereto in the House conference report which we have shown in full in the Appendix at page 43.

The strike in this case being a strike in violation of contract, all activity of the union and of the strikers in connection with it was concerted activity unprotected by the Labor Management Relations Act. As held in *Sands*, Lion Oil Company was not, after the strike, obligated to bargain with the union and had the right to permit individual strikers to return to work. The Board, therefore, was without authority to enter the order entered by it in this case.

For these reasons the order of the Court of Appeals in this case setting aside the order of the Board was proper and should be affirmed regardless of whether that order may be sustained by the application of Section 8 (d) of the Act to the facts in this case. "In the review of judicial proceedings, the rule is settled that, if the decision below is correct, it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason." *Brown* v. *Allen*, 344 U. S. 443, 459, *Helvering* v. *Gowran*, 302 U. S. 238, 245.

Point II

THE UNION, IN CALLING THE STRIKE INVOLVED IN THIS CASE AND CAUSING THE EMPLOYEES REPRESENTED BY IT TO REFUSE TO WORK FOR THE COMPANY, TERMINATED THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE UNION AND LION OIL COMPANY WITHIN THE MEANING OF THE WORD "TERMINATE" AS USED IN SECTION 8 (d) OF THE ACT WITHOUT COMPLYING WITH THE REQUIREMENTS OF THAT SECTION WITH RESPECT TO SUCH TERMINATION, AS A CONSEQUENCE OF WHICH THE BOARD HAD NO AUTHORITY TO ISSUE THE ORDER WHICH IT ISSUED IN THIS CAUSE.

The Court of Appeals was correct in holding that the strike here involved was in violation of Section 8 (d) of the Act and in setting aside the order of the Board on that ground.

Section 8 (d) states specific requirements which must be met by a party to a collective bargaining agreement who, by unilateral action, terminates that agreement. A party to such an agreement who terminates it by unilateral action without complying with all those conditions is made guilty of the commission of an unfair labor practice.

At the time the strike here involved began, the contract between the union and Lion Oil Company, in accordance with the provisions of sub-paragraph (b) of Article I (R. 28) of the contract, could have been terminated by either party on sixty day notice given to the other. The union, however, did not elect to terminate the agreement, as, under the contract, it had a right to do, by notice to the company, but took the bit in its teeth and called the employees here involved out on strike, thereby breaching,

repudiating and terminating that contract, with total disregard of all of the requirements of Section 8 (d) of the Act.

We submit that the legislative history, with respect to the various provisions of the Act, to which we have referred in our discussion of the point that a strike in violation of contract is unprotected activity under Section 7, demonstrates that the total breach and repudiation of the contract here involved, by the union and the strikers, constituted a termination of that contract within the meaning of the word "terminate" in the introductory clauses of the proviso of Section 8 (d) of the Act.

By the refusal of the men to work under the contract, it became impossible for Lion Oil Company to perform its obligations under the contract. The strike of April 30, 1952, sapped the contract of all vitality, bringing its active existence to an end.

Viewing the use of the word "terminate" in the introductory clauses of the proviso of Section 8 (d) in the light of the intention expressed in the legislative history of the Act, that strikes in violation of contract should be unprotected activity; that collective bargaining contracts were, by the Act, made equally binding and enforceable on both parties; and the concurrence by the minority in the committee report on the bill in the Senate that collective bargaining agreements should be faithfully performed by the parties, the word "terminate" as used in the introductory clauses of the proviso of Section 8 (d) would be hollow indeed if its meaning, as there used, is not sufficiently broad to denote a total breach and repudiation of a collective bargaining agreement. The word "terminate" was there used in its factual sense.

If the union had, after October 23, 1951, adopted the course of terminating the contract as provided in the con-

tract before calling a strike, if could have done so by giving a sixty day written notice of its election to do so, which would have, in accordance with the provisions of the contract, ended the contract at the expiration of the sixty days. That notice also would have complied with the mandate of Section 8 (d) of the Act with respect to notice of termination. If such notice had been given and the union had thereafter called this strike prior to the expiration of the sixty days, it would have committed an unfair labor practice under the provisions of Section 8 (d) and the striking employees which it represented would have lost their status as employees under the loss of status provision of that Section.

The union and the employees participating in the strike in this case should not be placed in a more favorable position merely because of the fact that the union disregarded totally the requirements of Section 8 (d) and, by its unilateral act, brought to an end the life of the contract by total breach and repudiation of it. To hold that by such action the union did not terminate the contract without compliance with the provisions of Section 8 (d) would be contrary to the purpose and spirit of the Act as a whole. That anomalous situation can be avoided by interpreting the word "terminate" as used in the introductory clauses of the proviso to mean not only the bringing of a collective bargaining contract to an end by exercising a right to terminate given in the contract, but also bringing such a contract to an end by total breach and repudiation of it.

If it is not true that the calling of the strike in this case by the union and the participation in the strike by the employees terminated the existing contract between the union and Lion Oil Company, the proviso of Section 8 (d) has no application to the facts in this case. That conclusion must be reached from the meaning of the introductory clauses of the proviso of Section 8 (d). Unless a strike in

total breach and repudiation of a contract terminates it, those introductory clauses relate only to a situation in which one party to a collective bargaining agreement, who has a right under the agreement to terminate it, takes the required step to do so. That step toward terminating the contract in accordance with contract provisions must be taken before any of the provisions of the following subsections (1), (2), (3) or (4) come into play. No notice to effect termination, as permitted by the contract, was given in this case.

We feel that the Board, in reaching the conclusion which it did reach in this case, fell into error in two respects — First, they misinterpreted the meaning of the word "modify" in the introductory clauses of the proviso of Section 8 (d), and, second, they misinterpreted the meaning of Article I of the contract here involved.

The majority of the Board held that the union complied with Section 8 (d) of the Act by giving the company notice of its desire to amend the contract, informing Federal Mediation and Conciliation Service and the Commissioner of Labor of Arkansas of that fact, and waiting sixty days after that notice was given before it called the strike though the contract remained in full force and effect at the time the strike was called. The gravamen of the reasoning of the majority in reaching that conclusion is the following statement (R. 213): "It suffices for our decision here that the contract specifically provided for modification and that the earliest date on which modification could be made effective was October 23, 1951."

If, by that statement, it was meant that October 23, 1951, was the first date upon which the contract could have been modified by mutual agreement, it is false. It is a most rudimentary principle of the law of contracts that a bilateral contract may be modified at any time by mutual consent of the parties, and nothing in the Act relates to

the parties so doing. If, by that statement, the majority of the Board meant that October 23, 1951, was the earliest date on which modification of the contract, by unilateral action of one of the parties, could be made, the statement is equally false. The contract here involved did not give either party the right to modify the contract by its unilateral act.

The language of Article I of the contract cannot be interpreted as giving to either party to the contract unilateral right to modify it, nor did it contain a re-opener clause, whatever that may mean. Article I of the contract provided only the procedure by which either party might have *canceled and terminated* the contract on the happening, in the order stated, of each of four conditions precedent: (1) written notice after August 23, 1951, by either party to the other of its desire to amend the agreement, (2) negotiations between the company and the union during the period of sixty days immediately following the receipt of such notice in an attempt to agree on the amendment proposed (3) absence of agreement as to the proposed amendment during the period stated, and (4) a sixty day written notice of termination of the agreement.

That provision was hand tailored to fit the requirement of Section 8 (d) of the Act with respect to the notice required to terminate a contract permitting unilateral termination by notice. It has nothing to do with modification of the contract by one of the parties to it.

The notice given by the union of its desire to modify the contract did not modify the contract. It was not so intended for the union had no right under the contract to modify it. The notice was given "in accordance with the provisions of the agreement" (R. 81) as the first step toward a possible termination of the agreement in the manner provided in Article I thereof.

The requirements of sub-sections (1), (2), (3) and (4) of the proviso of Section 8 (d), do not come into play with respect to modification of a contract in the absence of an act by one party to the agreement, who has a right under the contract to do so, to effect modification of it. The introductory sentence of the proviso so states. Therefore Section 8 (d) requirements, relative to modification of a contract, have no bearing in this case. The union, having no right under the contract here involved to modify it, could not take the first step toward modification of it which would call for compliance with sub-sections (1), (2), (3) and (4) of the proviso.

That conclusion is supported by the statement made by Senator Taft during the debate upon the bill in the Senate, explaining the functions of the Federal Mediation and Conciliation Service, as follows (Cong. Rec. April 23, 1947, p. 3955):

> "We have provided in the revision of the collective-bargaining procedure, in connection with the mediation process, that before the end of any contract, whether it contains such a provision or not, either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective bargaining, and then for the intervention of the Mediation Service. If such notice is given, the bill provides for no waiting period except during the life of the contract itself. If, however, either party neglects to give such notice and waits, let us say, until 30 days before the end of the contract to give the notice, then there is a waiting period provided during which the strike is an unlawful labor practice for 60 days from that time, or to the end of the contract and 30 days beyond that time. In that case there is a so-called waiting period during which a strike is illegal, but it is only brought

about by the failure of the union itself to give the notice which the bill requires shall be given."

Those remarks of the Senator made in debate should be considered in the light of the statement made by him and other members of the committee in Senate Report 105 on S. 1126 (S. Rep. No. 105, 80th Cong., 1st Sess., p. 24) where it is stated with respect to Section 8 (d) of the Act:

> "Another substantive feature of this subsection is a provision which relates to employers and labor organizations which are parties to collective agreements. Most agreements have an expiration date, with an automatic renewal clause in the absence of advance notice by either side of a desire to terminate or modify. Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the terminal date, if they desire to terminate or amend. Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing the old contract has the duty to notify the new Federal Mediation Service of the impasse. Should the notice not be given on time, irrespective of the presence or absence of a 60-day clause in the collective agreement, it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period. Any employee who engages in a strike during the 60-day period would lose any rights under sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed. It should be noted that this section does not render inoperative the obligation to conform to notice provisions for longer periods, if the collective agreement so provides. Failure to give

such notice, however, does not become an unfair labor practice if the 60-day provision is complied with."

The argument of counsel for petitioner with respect to application of Section 8 (d) to the facts in this case, is filled with statements misconstruing the meaning of Article I of this agreement. We have heretofore directed attention to a few of them. The Court will recognize many others.

The Board was also in error in relating this strike to the notice given by the union to Lion Oil Company on August 24, 1951. That notice stated the desire of the union to amend the existing contract in 43 particulars (R. 82-94). This strike was called by the union eight months later as a part of a nationwide strike in the oil industry called by the union, and other unions collaborating with it (R. 117) to support their nationwide demand for a specific wage increase of 22c an hour in each hourly wage rate then in effect, increased allowances for shift differentials and an additional holiday with pay.

Counsel for the petitioner attempt to differentiate the words "expiration date" in sub-section (1) of the proviso of Section 8 (d) and in sub-section (4) thereof. It is apparent to us that the two words mean exactly the same thing in both places, their meaning being the date upon which the existence of a bilateral collective bargaining contract comes to an end.

If we are correct in our contention that the word "terminate" should be construed as we have stated, the calling of the strike in this cause by the union was an unfair labor practice under the provisions of Section 8 (d) of the Act. Consequently, the Court of Appeals was correct in applying the provisions of that Section to the facts in this case and setting aside the order of the Board. An unfair labor practice having been committed by the union and

participated in by the strikers, the order of the Board did not effectuate the purposes of the Act.

If, however, this Court is of the opinion that the provisions of Section 8 (d) are not applicable to the facts in this case, nevertheless the order of the Court of Appeals should be affirmed on the ground that calling this strike, in violation of contract, and the participation of the strikers in it, was unprotected activity by the union and the strikers.

CONCLUSION

For the reasons which we have stated, it is respectfully submitted that the judgment of the court below should be affirmed.

Jeff Davis
B. L. Allen
Sam Pickard, Jr.

APPENDIX

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and condi-

tions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof,

such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

"RIGHTS OF EMPLOYEES

"SEC. 7 (a) Employees shall have the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities (not constituting unfair labor practices under section 8 (b), unlawful concerted activities under section 12, or violations of collective-bargaining agreements) for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities: Provided, That nothing herein shall preclude an employer from making and carrying out an agreement with a labor organization as authorized in section 8 (d) (4)."

"ENFORCEMENT OF CONTRACT RESPONSIBILITIES

The committee bill makes collective-bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accord with the purpose of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract, binding on both parties, should be made' (*H. J. Heinz & Co.*, 311 U. S. 514).

The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union. This is an almost impossible process. Despite these practical difficulties in the collection of a judgment against a union, the National Labor Relations Board has held it an unfair labor practice for an employer to insist that a union incorporate or post a bond to establish some sort of legal responsibility under a collective agreement.

President Truman, in opening the management-labor conference in November 1945, took cognizance of this condition. He said very plainly that collective agreements should be mutually binding on both parties to the contract:

> We shall have to find methods not only for peaceful negotiations of labor contracts, but also of insur-

ing industrial peace for the lifetime of such contracts. Contracts once made must be lived up to and should be changed only in the manner agreed upon by the parties. If we expect confidence in agreements made, there must be responsibility and integrity on both sides in carrying them out.

If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."

"It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives. (See *American News Co.*, 55 N. L. R. B. 1302, and *Thompson Products*, 72 N. L. R. B. 150). The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N. L. R. B.* v. *Sands Manufacturing Company*, 306 U. S. 332); or in breach of some other Federal law (*Southern Steamship Company* v. *N. L. R. B.*, 316 U. S. 31); or who engage in illegal acts while on strike (*Fansteel Metallurgical Corp.* v. *N. L. R. B.*, 306 U. S. 240).

This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions."

RIGHTS OF EMPLOYEES

Both the House bill and the Senate amendment in amending the National Labor Relations Act preserved the right under section 7 of that act of employees to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill, however, made two changes in that section of the act. *First*, it was stated specifically that the rights set forth were not to be considered as including the right to commit or participate in unfair labor practices, unlawful concerted activities, or violations of collective bargaining contracts. *Second*, it was specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

The first change in section 7 of the act made by the House bill was inserted by reason of early decisions of the Board to the effect that the language of section 7 protected concerted activities regardless of their nature or objectives. An outstanding decision of this sort was the one involving a 'sit down' strike wherein the Board ordered the reinstatement of employees who engaged in this unlawful activity. Later the Board ordered the reinstatement of certain employees whose concerted activities constituted mutiny. In both of the above instances, however, the decision of the Board was reversed by the Supreme Court. More recently, a decision of the Board ordering the reinstatement of individuals who had engaged in mass picketing was reversed by the Circuit Court of Appeals (*Indiana Desk Co.* v. *N. L. R. B.*, 149 Fed. (2d) 987) (1944).

Thus the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct. In its most recent decisions the Board has been consistently applying the principles established by the courts. For example, in the *American News Company case* (55 N. L. R. B. 1302) (1944) the Board held that employees had no right which was protected under the act to strike to compel an employer to violate the wage stabilization laws. Again, in the *Scullin Steel case* (65 N. L. R. B. 1294) and in the *Dyson case* (decided February 7, 1947), the Board held that strikes in violation of collective bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second *Thompson Products case* (decided February 21, 1947) the Board held that strikes to compel the employer to violate the act and rulings of the Board thereander were not concerted activities protected by the provisions of section 7. The reasoning of these recent decisions appears to have had the effect of overruling such decisions of the Board as that in *Matter of Berkshire Knitting Mills* (46 N. L. R. B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of section 7 were unnecessary. Moreover, there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act."

"In section 7 of the conference bill there has been eliminated the first of the proposed changes contained in the House bill—that is, the language specifically excluding from the protection of section 7 unfair labor practices, unlawful concerted activities, and breaches of collective-bargaining agreements. The rejection of this clause by the conferees does not mean that concerted activities which are made unfair labor practices are lawful by reason of breaches of law, breaches of contract, or that their objectives should be deemed 'protected activities' under the act. In the early period of the Board there had been decisions to the effect that the language of section 7 protected concerted activities, regardless of their nature or objectives. An outstanding decision of this sort was one involving a sit-down strike wherein the Board ordered the reinstatement of employees engaged in the unlawful activity. In another case the Board ordered certain seamen to be reinstated, although their concerted activities amounted to mutiny under another statute. In both of these instances, however, the decision of the Board was reversed by the Supreme Court (*Fansteel Metallurgical Corp.* v. *N. L. R. B.* 306 U. S. 240; *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31). The Supreme Court has also interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N. L. R. B.* v. *Sands Manufacturing Co.*, 306 U. S. 332).

Both the House bill and the Senate amendment preserved the right under section 7 of employees to self-organization to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The House bill specifically set forth that employees were also to have the right to refrain from self-organization, etc., if they chose to do so.

In its most recent decisions the Board has been consistently applying the principles established by the Supreme Court. For example, in the *American News Company case* (55 N. L. R. B. 1302 (1944)), the Board held that employees had no right protected under the act to strike to compel an employer to violate the wage-stabilization laws. Again, in the Scullin Steel case and in the Dyson case (decided February 7, 1947), the Board held that strikes in violation of collective-bargaining contracts were not concerted activities protected by the act, and refused to reinstate employees discharged for engaging in such activities. In the second Thompson Products case (decided February 21, 1947), the Board held that strikes to compel the employer to violate the act and rulings of the Board thereunder were not concerted activities protected by the provisions of section 7. These recent decisions have had the effect of overruling the decision of the Board in *Matter of Berkshire Knitting Mills* (46 N. L. R. B. 955 (1943)), wherein the Board attempted to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement.

By reason of the foregoing, it was believed that the specific provisions in the House bill excepting unfair labor practices, unlawful concerted activities, and violation of collective-bargaining agreements from the protection of section 7h were unnecessary. Moreover, there was a fear that the inclusion of such a provision might have a limited effect and make unlawful activities other than those specifically mentioned subject to the protection of the act. Other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the new National Labor Relations Act adopted by the conference committee, it is stated with reference to undesirable practices of labor organizations, their officers, and members that the 'elimination of such

practices is a necessary condition to the assurance of the rights herein guaranteed.' This demonstrates a clear intention that these undesirable concerted activities are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. Furthermore, in section 10 (c), as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause."